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ABSTRACT

The legal question of the scope of administrative authority Congress has actually conferred upon the Commissioner of Education in the listing of accrediting agencies of institutions of higher education is addressed. To ensure that its tax monies would not be paying for substandard education, but to avoid controlling education, the government, through the 1952 Korean War GI Bill, began its reliance on private accrediting agencies. State approval agencies were authorized to approve courses offered by an institution that had been accredited by a nationally recognized accrediting agency, and the Commissioner of Education was authorized to list such accrediting agencies. However, during the past decade, private accreditation has been criticized and, in response, the Office of Education has expanded its role until it has begun to proximate that of a regulatory agency. Abuses of the guaranteed student loan program, advertising, business practices, refunds, and other wrongdoing have been targets of regulations. Much of the criticism and Office of Education response assumes that Congress has given administrators broad authority to fashion standards governing the selection of those accrediting agencies it will list, as long as the standards serve public interest as currently perceived. It is demonstrated in this report that the scope of administrative discretion is narrower than many critics and government officials have assumed, and that many of the proposals for change have been directed to the wrong branch of the government. (JMD)

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FEDERAL RELIANCE ON EDUCATIONAL ACCREDITATION

THE SCOPE OF ADMINISTRATIVE DISCRETION

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An occasional paper

FEDERAL RELIANCE ON EDUCATIONAL ACCREDITATION

THE SCOPE OF ADMINISTRATIVE DISCRETION

Matthew W. Finkin

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FOREWORD

To read much of present-day writing on the subject and to listen to current debate, one would gain the impression that educational accreditation is a relatively recent phenomenon that came into being primarily for the purpose of serving the needs of the federal government in determining the eligibility of institutions of postsecondary education for public funds. Certain federal officials, in fact, on occasion have suggested that accrediting organizations, while located in the private sector, really are, or should be considered as, quasi-governmental agencies.

If the truth be known, however, nongovernmental accreditation has been around for more than 80 years; and it has only been in recent times that the federal government officially took notice of this enterprise. The Veterans Readjustment Assistance Act of 1952 first turned to accreditation to serve as a "reliable authority as to quality training." But it was not until 1968 that the U.S. Office of Education established the Accreditation and Institutional Eligibility Staff and the Commissioner's Advisory Committee.

This originally modest operation has grown into the Division of Eligibility and Agency Evaluation with a staff of 30 persons and an annual operating budget of about $1,000,000. DEAE now assists the Commissioner in the recognition of more than 70 accrediting bodies and conducts formal reviews of these agencies every four years or oftener. The criteria used for this purpose have been revised periodically and have grown ever more detailed and demanding.

In exercising this recognition function, has DEAE gone beyond the intent of the Congress? Dr. Matthew Finkin thought so in 1973 and wrote an important article, "Federal Reliance on Voluntary Accreditation: The Power to Recognize as the Power to Regulate," in July 1973 issue of the *Journal of Law and Education*. We asked Dr. Finkin, now a Professor of Law at Southern Methodist University, to take yet another look at this issue in the light of more recent developments, and he has done so in this publication. Dr. Finkin is a lawyer and a legal scholar. He knows higher education as a student, as a professor, and through his former role as legal counsel to the American Association of University Professors. He has no official ties with accrediting agencies, with COPA, or with the Office of Education.

This, we believe, is a perceptive and penetrating analysis of a matter that ought to be of concern to all who value the freedom of education from federal control. We commend it to you.

Kenneth E. Young
President
The Council on Postsecondary Accreditation

INTRODUCTION

In seeking to assist both students and the institutions of higher education they attend, the federal government faced a minor conundrum. On the one hand, government sought to be assured that its funds were serving the purposes intended; that is, that tax monies would not be paying for substandard education. But, on the other hand, government also desired to eschew any control of education. How can government determine that the educational offerings of the institutions assisted (directly or indirectly) meet at least minimum qualitative standards without itself setting those standards? The solution, chosen first in 1952 and relied upon in much of the subsequent legislation, appeared to be simplicity itself: government would be assured of institutional or programmatic quality merely by relying upon the decisions of private accrediting agencies whose determinations are widely recognized in the academic community as being sufficiently reliable for such a purpose.

However, during the past decade, private accreditation, and the propriety of federal reliance upon it, has come in for substantial criticism. In response, the Office of Education has expanded its role vis-a-vis accrediting agencies until it has begun to proximate that of a regulator of accreditation.[1] Much of the criticism, and all of the response, has simply assumed that Congress has given federal administrators broad authority to fashion standards governing the selection of those accrediting agencies it will rely upon, so long as the standards adopted comport with current notions of how the public interest is best served.[2] Almost unassessed in the debate is the validity of that assumption.

Moreover, the determination of the proper scope of administrative discretion under the existing statutory scheme is an essential predicate to analysis; only by first deciding what government's statutory role in accreditation *is* can one begin to consider alternatives for what it ought to be. In addition, this threshhold determination supplies a much-needed institutional focus. To conclude, as this discussion will, that the scope of administrative discretion is considerably narrower than many critics and government officials have heretofore assumed, is also to conclude that many of the proposals for change have been directed to the wrong branch of government. Accordingly, this discussion addresses the threshhold legal question of the scope of administrative authority Congress has actually conferred upon the Commissioner of Education in the listing of accrediting agencies.

THE ACCREDITATION-RELIANCE SYSTEM

Establishing the Model: 1952-1968

The model for the system of federal reliance upon private accreditation was established in 1952 by the Korean War GI Bill.[3] Congress was concerned about "fly-by-night" schools and "blind alley" programs. State approval had, in many instances, been no more than a rubber stamp. A role for the Office of Education was proposed and, to some extent, contested by the Veterans Administration. As part of the resulting compromise, state approval agencies were authorized to approve courses offered by an institution that had been accredited "by a nationally recognized accrediting agency or association" and, as a facility for state approval agencies, the Commissioner of Education was authorized to list such accrediting agencies:

> For the purposes of this Act the Commissioner shall publish a list of nationally recognized accrediting agencies and associations which he determines to be reliable authority as to the quality of training offered by an educational institution....[4]

This solution rested upon three closely related assumptions. First, the statute assumed that "nationally recognized accrediting agencies" existed and were of sufficient reliability that state government could permissibly piggy-back its own approval of courses upon the private agency's decision-making processes. Second, reliance upon private determinations of educational quality would obviate the threat of federal control of education. Third, the role of the Commissioner of Education in determining that such nationally recognized agencies were of sufficient reliability would be essentially ministerial. The last assumption, reflected both in language that merely directs the Commissioner to publish a list, and in the legislative history,[5] is a necessary corollary of the other two; it would be anomalous for the government to avoid the direct regulation of educational institutions by regulating the substantive standards of accrediting agencies, thereby doing indirectly what the statute was intended to avoid.

The ministerial character of the Commissioner's role is embodied as well in the agency's contemporary interpretation of the statute, which builds upon the statutory directive that the Commissioner determine whether or not an accrediting agency is nationally recognized as a reliable authority. Following enactment, the Commissioner con-

sulted an "advisory group of educators" who were largely drawn from the accrediting community.[6] The resulting criteria for listing by the Commissioner accepted current accrediting practices, particularly of the regional associations. Of significance here was the requirement that the agency must have "gained acceptance of its criteria, methods of evaluation, and decisions, by educational institutions, practitioners, licensing bodies and employers throughout the United States." Similarly, an agency that has been in existence for less than two years was required to demonstrate "to the satisfaction of the Commissioner....that it has gained the acceptance required" during the shorter period.

Further, the publication of the criteria was accompanied by the initial Commissioner's list, which included the six regional associations and twenty-one specialized agencies. Provision was made for additions to the list. However, unlike the initial list, it was contemplated that additions would be made at the "request" of accrediting agencies that desired to be so listed.

In ensuing measures such as the National Defense Education Act, the Nurse Training Act, and the Higher Education Act of 1965, the language of the 1952 Act was looked to, in essence, as "boilerplate,"[7] albeit with occasional modifications that most often allowed some unaccredited schools to be eligible for participation if their credits would be considered transferable by three accredited schools or if there was reasonable assurance that they would achieve accreditation. In the Higher Education Facilities Act of 1963 and the State Technical Services Act of 1965, the Commissioner was authorized in certain instances to engage in direct accreditation upon a finding that there was no reliable nationally recognized accrediting agency suitable for the purposes of those acts. On balance, the legislative history of all these measures indicates continued general Congressional acceptance of the assumptions upon which the system of federal reliance upon private accreditation was built.[8]

That reliance was placed in question in the period 1965 to 1968 when a struggle took place for control of nurse training accreditation. These developments shed further light on the Commissioner's authority and the institutional roles of Congress and the Office of Education in setting accreditation policy. The Nurse Training Act of 1964 extended to all categories of nurse training institutions. The Act required that they be accredited by a body or bodies approved for such purpose by the Commissioner but allowed for approval by the Commissioner if he found, after consultation with the appropriate accrediting agency or agencies, that there was reasonable assurance that the program would meet accreditation standards. The Commissioner had approved the National League for Nursing as the sole agency for nurse training accreditation. The American Association of Junior Colleges had been especially critical of the requirement of programmatic nurse-training accreditation in addition to the institutional accreditation carried on by the regional associations, and

special note was made of how few junior college programs had been either accredited or given reasonable assurance of accreditation by the NLN.[9] The Senate Committee on Labor and Public Welfare proposed that the Commissioner be given direct accreditation authority. The wisdom of this proposal was questioned by HEW. Undersecretary Wilbur Cohen pointed out that regional and state accreditation applied to the institution as a whole and would not necessarily attest to the quality of a nurse training program. Moreover, he viewed the proposed authority as unnecessary because

> under existing law there is no restriction on the accrediting body or bodies which the Commissioner of Education may recognize for the purposes of this act. If he should find, therefore, that accrediting bodies other than the National League for Nursing have developed accrediting or approval programs that give attention to the quality of nurse education programs in colleges or junior colleges he could recognize these additional bodies for accreditation purposes.[10]

Nevertheless, Congress did grant accreditation authority to the Commissioner. That authority was repealed three years later by the Health Manpower Act of 1968. That Act allowed institutions to rely upon either programmatic or institutional accreditation. Interestingly, in the Allied Health Professions Personnel Training Act of 1966, Congress expanded the definition of a "training center for allied health professions" *inter alia* to include divisions within regionally accredited junior colleges, thereby delegating accreditation authority directly to the regional associations obviating any listing (or review) by the Commissioner for the purposes of that Act.

The Era of Quasi-Regulation: 1968 to Present

In 1968 the Office of Education established a special staff on accreditation and institutional eligibility and an Advisory Committee to review and recommend policy and to review and recommend accrediting agencies under the Commissioner's criteria for listing. As a major study observed, this "action was a response to the mounting administrative and policy problems resulting from the repeated statutory use of accreditation and, most immediately, from the extension of vocational loans to students at accredited proprietary schools. It was not a response to any direct legislative injunction."[11]

The following year, the Commissioner adopted the first revision in the 1952 criteria.[12] The revision expanded upon the procedures that accrediting agencies must employ. It also provided for periodic reevaluation of accrediting agencies by the Commissioner at least once every four years. However, in sharp contrast to Secretary Cohen's

observation that nothing prohibited the Commissioner from listing all accreditation agencies that otherwise met statutory standards, the Office of Education took the position that "it is unlikely that more than one association or agency will qualify for recognition" either for a defined geographic area or in a given field or program. Moreover, in order to be listed the agency would be required to demonstrate "its capacity and willingness to enforce ethical practices among the institutions and educational programs accredited by it."

In 1974 the Commissioner adopted a second revision that expanded the scope of the criteria even more.[13] Procedurally, the criteria stressed far more than the 1952 and 1969 criteria that accrediting agencies were to be considered as applicants for listing and renewal. Further, it continued to expand upon the procedures that approved agencies must employ in the accrediting process.

However, four areas of additional regulation cannot be viewed simply as extensions of procedure. First, the criteria expanded upon the requirement that that agency "foster ethical practices" by including under that head "equitable student tuition refunds and nondiscriminatory practices in admission and employment." Second, it required the agency to encourage "experimental and innovative programs." Third, it required that the agency take "into account the rights, responsibilities, and interests of students, the general public, the academic, professional, or occupational fields involved, and institutions." Finally, and apparently to the end envisioned by the sweeping requirement just quoted, the accrediting agency was required both to include "representatives of the public" in its decision-making processes and to assure that the composition of its policy and decision-making bodies reflect the community of interests directly affected by the scope of its accreditation.

These revisions express a fundamental lack of confidence that accrediting agencies adequately function to protect the public interest. They are premised upon the perceived need to make listed accrediting agencies more responsive to the demands of consumer protection, the need for educational change, and the observance of ethical institutional practices, both directly, by so providing in the recognition criteria, and indirectly, by changing the composition of the governing bodies of listed accrediting agencies. As the Director of the Accreditation and Institutional Eligibility staff wrote of the 1969 revision, the modifications in criteria reflect "a concern that a recognized accrediting agency shall manifest an awareness of its responsibility to the public interest, as opposed to the narrow parochial education or professional interest" of the accredited constituency.[14] Similarly, he observed of the 1974 revision that, "the Commissioner's Criteria for Recognition has served as a stimulus for progressive and responsible change on the part of accrediting agencies."[15]

The ensuing section will analyze whether these modifications of the Commissioner's criteria are consistent with the authority delegated by Congress. Before reaching that question, it is important to

ascertain whether any Congressional action during the "era of quasi-regulation"[16] can be understood as broadening the Commissioner's authority or as altering the statutory bases for federal reliance upon private accreditation.

Unlike the legislative histories of much of the earlier legislation that, save for the dispute about nurse-training, dealt little, if at all, with the accreditation system, Congressional attention was drawn extensively to asserted deficiencies in the accreditation-reliance system in hearings dealing explicitly with accreditation, and especially in connection with abuses of the guaranteed student loan program.[17] The Congressional response in the Higher Education Amendments of 1972 was to give the Commissioner authority to prescribe regulations to provide for a "fiscal audit" of institutions participating in the insured student loan program, to establish "reasonable standards of financial responsibility" for such institutions, and to suspend or terminate the eligibility of institutions that fall afoul of such regulations.[18] This power was expanded by the Education Amendments of 1976 to include all aid programs authorized under Title IV.[19] Moreover, the latter enactment required institutions to carry out a program of dissemination of specified information to current and prospective students. The Commissioner was given additional power to suspend or terminate the eligibility of institutions to participate in these student aid programs, due to substantial misrepresentation of the employability of its graduates.

The impetus behind these legislative efforts was the widespread abuse of the guaranteed student loan program. A report of the House Committee on Government Operations in 1974 concluded that the accreditation-reliance system was inadequate as a check upon abuses of the program. It noted that

> Government reliance on accreditation...has extended well beyond the area of educational quality. The accreditors have responded to complaints from Government agencies regarding advertising, business practices, refunds, and other alleged wrongdoing....While they have cooperated, and state that they desire to continue doing so, the accrediting associations also say that they are not Government regulatory agencies, and should not be used as such.[20]

The Senate Committee on Government Operations held hearings on the Guaranteed Student Loan Program in December 1975. Its suggestions were communicated to the Senate Committee on Labor and Public Welfare, then considering the Education Amendments of 1976, by letter of Senators Samuel Nunn and Charles Percy. They indicated that the "accreditation process" presented one problem among a number of others that "could be corrected by new or revised regulations or administrative procedures" and recommended that the Committee on Labor and Public Welfare "might want to consider in-

cluding in pertinent legislation a directive that HEW promulgate regulations on these and other specified areas...."[21]

Shortly before the Labor and Public Welfare Committee received this recommendation the administration's bill was introduced. With respect to accreditation, it would have given the Commissioner's Advisory Committee statutory status and would have altered the Commissioner's authority to list accrediting agencies by requiring the Commissioner to determine not only that they are a reliable indicator of educational quality, but also that they are a reliable authority as to "the probity" of the institution.[22] The Senate Committee on Labor and Public Welfare reacted to both proposals:

> One item of particular interest among the Government Operations Committee recommendations was their discussion of the relationship between private accrediting associations and eligibility for Federal student assistance programs. The Committee [on Labor and Public Welfare] in recent years has held several hearings regarding this critical area. In strengthening the existing Title IV, the Committee took no direct action affecting the existing and historically developed relationship between the U.S. Commissioner of Education and accrediting associations. An Administration proposal for statutory changes in this area was presented to the Committee at such a late date that realistic consideration was impossible... The Committee is willing at an appropriate future time to review this important matter of accreditation and eligibility and consider legislative improvements.[23]

Thus the Senate Committee on Labor and Public Welfare rejected the Commissioner's effort to secure express statutory authorization to require accrediting agencies to determine the "probity" of the institutions they accredit as a condition for being listed; the Committee thought this addition a novel departure from the existing and historically developed statutory scheme, requiring less hasty legislative consideration. Accordingly, neither the House Committee's 1974 report nor the Senate Committee's 1976 report can be read as endorsing the Commissioner's view of his authority under then existing law, nor would a later legislature's view of what a prior legislature meant by an enactment be entitled to much weight. Rather, the 1972 and 1976 enactments increased regulatory power only in areas where particular abuses were perceived, by direct delegation to government officials, and eschewed any alteration in the existing statutory authority of the Commissioner with respect to the accreditation system. From the perspective it is clear that nothing in the legislation enacted after 1968 represents any change in the basic statutory assumptions of the accreditation-reliance system. On the contrary, the post-1968 legislation indicates that when Congress sought to tighten controls over institutional activity, unrelated to

educational quality, to effect policies of consumer protection or financial responsibility, it chose to act directly by means unrelated to the system of institutional or programmatic accreditation.

AN ASSESSMENT OF THE COMMISSIONER'S CRITERIA

Substantive Requirements

The system of federal reliance upon private accreditation is premised upon the assumption that accrediting agencies exist and are sufficiently reliable indicators of educational quality that it is legally permissible for government to depend upon their determinations as a factor in the dispensation of public monies.[24] However, the Comsioner of Education has adopted three substantive criteria for the listing of accrediting agencies that, at the threshhold, would seem to be inconsistent with that assumption: namely, the requirement of "public" membership in the agency's governing body; the requirement that the agency police institutional observance of "ethical practices," including, specifically, discrimination in employment and admissions; and the requirement the agency encourage educational innovation.[25] Whereas these modifications are premised upon a concern that private accrediting agencies become more attuned to the "public interest, as opposed to the narrow parochial....interest" and that the Commissioner's criteria serve as "a stimulus for progressive and responsible change," the statutes that authorize the publication of an approved list of accrediting agencies are premised upon the assumption—akin to the Invisible Hand—that when accrediting agencies act in their own narrow parochial interests their determinations are reliable enough for the government to accept; thus, nothing in the statutory authority for the Commissioner's list would appear to authorize him to require that otherwise reliable agencies alter their policies to achieve what the Commissioner deems to be a progressive social policy.

Nevertheless, the responsible official within the Office of Education has offered several justifications for these requirements; the question is whether, as a matter of federal administrative law, the reasons supporting the expansion of the Commissioner's authority, either singly or taken as a whole, should be considered sufficiently persuasive to rebut what would otherwise appear to be a *prima facie* instance of administrative action *ultra vires* the enabling legislation.

First, it is argued by the Director of the Division of Eligibility and Agency Evaluation (DEAE) that

> accrediting bodies are performing an increasingly important societal role—a role in service to the broader society rather than one solely in service of the narrower educational com-

munity. And if the Federal Government is going to be justified in continuing strong reliance upon private accreditation, the accrediting associations will need to more explicitly recognize their obligation to protect the public interest.[26]

The argument is premised upon the assumption that there is residual authority under existing statutes to revise the Commissioner's criteria in order to secure conformity with evolving notions of what best serves the public interest. By this reasoning, the failure of the administration's 1976 legislative proposal to expand the Commissioner's statutory power would not necessarily foreclose the Commissioner's fuller exercise of authority he possessed under existing law. Support for this argument would look to the decision of the United States Supreme Court in *United States* v. *Southwestern Cable Co.*[27] which affirmed the Federal Communications Commission's assumption of jurisdiction over cable television despite the FCC's previously expressed doubt that it had jurisdiction and the failure of legislative efforts expressly to give it such jurisdiction. Mr. Justice Harlan opined,

> "underlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors"....Congress in 1943 acted in a field that was demonstrably "both new and dynamic," and it therefore gave the Commission "a comprehensive mandate," with "not niggardly but expansive powers."[28]

The analogy to *Southwestern Cable* is analytically useful, for, upon examination, the decision explains why the Office of Education's argument fails. As Louis Jaffe explains, the FCC had been "created at least in the image of the 'regulatory' agency. It has been given the trappings of authority...."[29] In contradistinction to the FCC, the Office of Education has not been given a "comprehensive mandate" with "expansive powers." On the contrary, a clearer expression of Congressional intent would be required before largely ministerial language can be converted into a regulatory mandate, especially where the subject of regulation impinges upon the determination of standards of educational quality, a subject traditionally shielded from federal regulation.[30]

Moreover, the altered role of accrediting bodies to which the Director of DEAE alludes is the product of government's own reliance upon them. This factor was not unforeseen by Congress; in fact, Congress was fully aware that new accrediting agencies would come into existence in response less to the antecedent demands of the academic community than to government's need to rely upon them. There is, to be sure, a real problem engendered by the creation of

accrediting agencies purely as a result of the federal government's need to have them as determinants of federal program eligibility. The determinations of these new agencies, particularly those concerned with proprietary vocational training, may be crucial to the institution's very existence. The resulting pressure upon the agency to grant accreditation may compound the "cronyism" that accreditation in general has been accused of;[31] but, the Commissioner's listing criteria under scrutiny here do not confront that issue at all. Moreover, the fact that such novel agencies may differ in kind or degree from the agencies that Congress contemplated by the legislation does not alter the scope of administrative authority, for Congress continued to build upon the perhaps fictive notion that even such novel agencies would be cast in the mode of their more well-established counterparts.

The ministerial nature of the Commissioner's role is illustrated by reference to the direct designation of the regional associations in the Allied Health Professions Personnel Training Act. In the absence of any governmental review of the regional associations under that Act to assure conformity with the public interest, the question would be presented of whether that Act is not an impermissible delegation of public power to a private group. The reason why it is not is explained by James O. Freedman. As Freedman put it, the United States Supreme Court

> has proceeded on the sensible premise that delegations to private parties are constitutional when they serve important public purposes and give promise of adequately considering and protecting the interests of all those subject to regulation....
>
> For example, courts commonly have sustained delegations to private parties in the form of statutes that attach public consequences to decisions that the delegate has made or would be making in any event for purposes quite independent of giving content to the legislation.[32]

It should be noted that a number of statutes administered by other federal agencies (including at least one that antidates the Korean War GI Bill) require institutional or programmatic "accreditation" without reference to any approval or review authority by those agencies.[33] Instinct in such provisions, however, is the requirement that the agency administering the relevant act will determine whether or not the institution or program is validly accredited; thus, the administering agency must determine, for the purposes of such an act, the reliability of the accrediting agency as a recognized determinant of education quality. The express statutory authority of the Commissioner of Education to publish a list of such agencies does not differ qualitatively from these other enactments. Just as such other federal agencies may not endeavor to alter the internal policies of otherwise well-recognized agencies as a condition of reliance upon them, neither may the Office of Education.

A second justification offered by the Office of Education stresses the voluntarism of the Commissioner's list. The Director of DEAE in refuting the existence of any federal intrusion into the affairs of accrediting agencies, stressed *inter alia* "the complete freedom of these organizations [accrediting agencies] to resign from the Commissioner's List."[34] The unarticulated premise of this justification is that applicants who voluntarily choose to apply for listing cannot complain of the standards they must conform to.

To be sure, the requirement of an application for listing is within the scope of the Commissioner's discretion. Even though the enabling statutes read as a directive to the Commissioner to list nationally recognized accrediting agencies, and can be read as a command to the Commissioner affirmatively to seek those agencies out, it is unlikely that the Commissioner could successfully recruit an uncooperative agency. Further, the Commissioner's contemporaneous reading of the 1952 Act did provide that subsequent listing would be at the "request" of the heretofore unlisted agency. Moreover, the courts have traditionally given federal administrative agencies great leeway in procedural matters; it cannot be said that the adoption of an application procedure is arbitrary, capricious, an abuse of discretion, or *ultra vires* the authorizing statutes.[35]

Nevertheless, the infirmity in this justification is that it decouples the Commissioner's criteria for listing from their statutory source; that is, it assumes that inasmuch as the relationship is voluntary, the Commissioner is free to adopt any condition of recognition that arguably serves the public interest, unencumbered by limitations imposed by the statutes that authorize the publication of the Commissioner's list. It is, however, "hornbook law" that the Commissioner's authority, being derived from statute, cannot rise higher than the statutory source. The question remains one of determining the permissible scope of administrative discretion, authorized by the relevant statutes, and on that question the voluntarism of the listing procedures is simply irrelevant.

The final justification offered by the Office of Education does return to the statutory source. The Director of DEAE has opined

> In order for accrediting agencies to merit the support and acceptance of government, and of society as a whole, they must keep themselves current with legitimate educational issues and trends. In this context, I find that some accrediting agencies have been derelict during the past several decades in not recognizing the socially-related character of educational quality. Thus, in an era of accelerated societal change, accrediting agencies often have found themselves cast in unduly conservative and obsolete postures. Two cases in point are the tardiness of some accrediting associations...in accepting the factors of discrimination and institutional probity as components of the educational quality equation. Concepts of

quality must be expansive, rather than restrictive; fluid, rather than static.[36]

However, the concept of educational quality, as employed in the relevant statutes, is not an elastic, "socially-related" one that would allow federal administrators to incorporate almost any factor they deemed socially progressive as part of the criteria for listing by the Commissioner.[37] As Mr. Justice Frankfurter put it, "laws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends."[38] The legislative end sought by reliance upon private accreditation was to assure that the instruction offered would meet minimum content standards of educational quality without federal regulation of those standards. When institutions have abused federal programs or fallen short of perceived societal needs unrelated to the quality of their educational offerings, such as the failure to afford better protection of the student consumer, Congress has chosen to legislate directly to correct those deficiencies rather than rely upon accrediting agencies for that purpose. In sum, the administrator's "expansive" and "flexible" definition of "quality" finds no statutory support and is inconsistent with the legislative scheme.

Procedural Considerations

Much of the Office of Education's refinement of the procedural standards that accrediting agencies must employ, while debatable in terms of the wisdom of requiring inflexible uniformity on the part of all accrediting agencies, cannot be said to be arbitrary or an abuse of administrative discretion. Similarly, the requirement of periodic re-evaluation of listed agencies is well within the ambit of discretion. However, the Office of Education has not confined itself only to the listing of those agencies whose activities can be shown to relate to eligibility for specific federal programs. Inasmuch as the statutory authority to list accrediting agencies is not a delegation to the Commissioner of Education to list accrediting agencies in general, but only those that will serve as an adequate determinant of educational quality for the purposes of particular legislative programs, an argument has been made that the Commissioner's failure to limit the list only to those agencies that serve a function under an identifiable federal program exceeds the discretion conferred by the authorizing legislation.[39]

Three considerations have been offered in rebuttal.[40] First, it has been argued that given the especial amorphousness of the GI Bill, the Office of Education simply cannot know the nature of each and every program for which accreditation could be relied upon by an appropriate state agency, and that, in effect, the Commissioner's list

includes only accrediting agencies that do, at least potentially, perform a function in determining eligibility for some federal program. Second, the listing of accrediting agencies that seem to perform no function in determining eligibility dates from the 1952 criteria and list. Finally, the Commissioner's list is looked to as a matter of practice or policy by other federal agencies that administer statutes that rely upon the fact of accreditation; the listing of accrediting agencies that may be unrelated to statutes that authorize the Commissioner to prepare a list of agencies is simply a service of the Office of Education to those other agencies. Accordingly, it could be suggested that the Office of Education need not secure express statutory authorization to perform such a service for these other federal agencies, less expert in educational matters and less experienced with the vagaries of accreditation, merely as an adjunct to the listing function that the Office of Education would otherwise preform.

The latter argument is not entirely to the point. Even if other federal agencies rely upon the Commissioner's determinations for the purposes of their statutes, it does not follow that the Commissioner is thereby free to list accrediting agencies at large, without a showing that they perform a function under some statute.

Seemingly more persuasive are the Commissioner's arguments to potential use and contemporaneous interpretation. It is conceivable that deference would be given to a long-standing policy that, at first blush, appears simply in aid of, and not essentially inconsistent with the overall legislative purpose. On the other hand, deference is less likely to the extent the policy is perceived as producing untoward consequences.

One effect of the Commissioner's indifference to whether a listed agency actually serves as a determinant for eligibility for federal funds concerns institutions. A claim by a listed accrediting agency to accredit a particular school or program carries with it a tacit presumption that, inasmuch as the agency is listed, it does perform a function as a determinant of eligibility with respect to some federal funds; thus, institutional administrators faced with an accreditation request by a listed accrediting agency may give the agency greater attention than would otherwise be deemed prudent or necessary. The result may contribute both to the proliferation of accrediting agencies and to the leverage they are able to assert.

In view of these implications and the clear wording of the authorizing statutes, the listing of agencies that perform no identifiable statutory function would appear to constitute an abuse of discretion. However, if the policy was thought by the Commissioner to be genuinely helpful, he could go far to salvage it with respect to the impact upon institutions by mitigating these untoward consequences; that is, the Commissioner could simply indicate in the published list which accrediting agencies do actually serve as determinants of eligibility and under what specific programs, and which are listed simply for their potential usefulness. This would dispel the uncertainty that confronts

institutional administrators faced with a claim by a listed accrediting agency. In addition, a modification simply in the form of the list that would maximize "consumer" information would be particularly fitting for an agency whose expressed concern for almost a decade has been to broaden consumer protection in education.

A second effect, however, concerns accrediting agencies and derives from the relationship of this policy to the closely related policy, adopted by the Office of Education in 1969 that, subject to exception, would limit the list to but a single accrediting agency for a given geographic area, field, or program. The justification for this limitation is the prevention of a proliferation of accrediting agencies. However, it is more than likely that an accrediting agency with lower (but acceptable) standards would continue to be better subscribed than an overlapping agency with higher standards, even if both were listed by the Commissioner. Further, the argument in support of the Office of Education's indifference to whether a listed agency actually fills a statutory need, points to the listing function simply as a facility for state and federal programs too numerous to catalogue. The Office of Education's role in performing this service function does not logically require that it certify to the soundness of one agency only in each field.

Equally troublesome is the fact that many of the relevant statutes speak in the plural of the agency or agencies, body or bodies, that the Commissioner may list in conjunction with the particular federal program involved. Secretary Cohen observed of just such a statute that no statutory limit had been placed upon the number of accrediting agencies that might be listed.[41] Accordingly, it remains to be seen whether, in light of these statutes, the Commissioner is entirely free to adopt such a blanket limitation, in lieu of making a particularized determination of the suitability of a limitation to a single agency when requests from overlapping or competing accrediting agencies are received under each such statute.

The full significance of this limitation lies in its relationship to the Commissioner's refusal to tie listing to a showing that the accrediting agency performs a function under any statute. As a result, the Commissioner of Education has become, in practical effect, the dispenser of an exclusive seal of approval—tantamount to a franchise[42]—upon accrediting agencies at large. Whether this "combination of ingredients" has contributed to or dampened the proliferation of accrediting agencies is highly debatable;[43] what it does accomplish is to provide a strong incentive for accrediting agencies to seek listing by the Commissioner which, in turn, gives the Commissioner added leverage to effect "progressive change."

CONCLUSIONS

The statutory system of federal reliance upon private accreditation is built upon the legislative assumption that such accrediting agencies exist and are sufficiently reliable that it is constitutionally permissible for the government to accept their determinations of educational quality. Portions of the Commissioner of Education's criteria for listing accrediting agencies are at odds with this statutory foundation and, to that extent, are beyond the scope of discretion conferred by Congress.

It may be that absent alterations in the composition of their governing boards, greater interest in educational reform and greater sensitivity to the ethics of accredited institutions, existing accrediting agencies—no matter how well recognized in the academic community their judgments are as reliable indicators of educational quality—are not serving adequately as insurers of a larger public interest. But Congress has not delegated authority to the Office of Education to define that larger interest and assure conformity with it as a condition of federal reliance. If the Commissioner is correct, if accrediting agencies should be reformed before they are relied upon by government, then the reformation must be effected by the legislature.

NOTES

1. "The Office [of Education] has come increasingly to exercise with respect to accrediting agencies a regulatory function comparable in substance if not in form to that of other government regulatory bodies." H. Orlans, N. Levin, E. Bauer, and G. Arnstein, *Private Accreditation and Public Eligibility* 98 (1974) [hereinafter cited as *The Orlans Report*]. The Office of Education official primarily responsible for the management of the accreditation-reliance system has described his division's function as "quasi-regulatory." Memorandum from John R. Proffitt, Director, Division of Eligibility and Agency Evaluation, to Executive Deputy Commissioner for Educational Programs, Office of Education, June 3, 1977.

2. The Federal Trade Commission's Bureau of Competition urged the Commissioner of Education not to list the Liaison Committee on Medical Education (LCME) as a recognized accrediting agency for medical schools. The Bureau's concern was the LCME's close tie to the American Medical Association disabled it from serving as an adequately "neutral" accreditor. In support of its argument, the Bureau pointed out that, "Accrediting groups are more and more being held to a standard of accountability to the public.... "Letter of May 6, 1977 from Daniel Schwartz, Acting Director, Bureau of Competition, to Ernest Boyer, United States Commissioner of Education. Thus the Bureau merely assumed that the Office of Education has the power to consider the larger "public interest" in listing accrediting agencies.

3. The legislative history of the system of federal reliance on accreditation is treated in Finkin, *Federal Reliance on Voluntary Accreditation: The Power to Regulate*, 2 J. Law & Educ. 339 (1973) [hereinafter cited as Finkin].

4. PL 82-250, Sec. 253 (1952).

5. *See generally*, Finkin at 343-346. The bill proposed by the House Committee on Veterans' Affairs contained a directive to the Administrator of Veterans' Affairs to publish a list of accrediting agencies in language identical to that ultimately adopted. Ultimately the Committee accepted the substitution of the Commissioner of Education for the Veterans Administration. The Committee emphasized that the "contemplated function of the Office of Education is of a professional character only." H.R. Rep. No. 1973, 82nd Cong., 2nd Sess. 35 (1952).

6. 17 Fed. Reg. 8929 (1952).

7. *The Orlans Report* at 107. Orlans suggests, however, that reliance upon the model of the 1952 Act was also the product of lobbying and political choice. *Id.* at 107-108.

8. Finkin at 348-363.

9. The history of these measures is treated in Finkin at 363-367.

10. Letter from Undersecretary Cohen quoted in S. Rep. No. 1378, 88th Cong., 2nd Sess. at 17 (1969).

11. *The Orlans Report* at 133.

12. 34 Fed. Reg. 643 (1969).

13. 39 Fed. Reg. 30042 (1974).

14. Proffitt, *The U.S. Office of Education, Accreditation and the Public Interest*, Address presented at a meeting sponsored by U.S.O.E. and the National Commission on Accrediting, November 6, 1970, quoted in Finkin at 369.

15. Proffitt, *Accreditation and the Federal Government or The Federal Connection*, Address before the Conference of Academic Deans of Southern States, December 14, 1976 [hereinafter cited as Proffitt's *Connection*].

16. The phrase is Orlans'. *The Orlans Report* Ch. D. at 133.

17. *See* Hearings before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare on Accreditation of Postsecondary Educational Institutions, 93d Cong. 2nd Sess. (1974), Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations on the Guaranteed Student Loan Program, 94th Cong. 1st Sess. (1975).

18. PL92-318, Sec. 132E (1972).

19. PL94-492, Sec. 133, 131 (1976). *See also* the conference report, H. Rep. 94-1701 *in* 4 U.S. Code Cong. & Admin. News at 4903 (1976).

20. H. Rep. No. 93-1649, 93d Cong., 2nd Sess. at 31 (1974).

21. S. Rep. 94-882 *in* 4 U.S. Code Cong. & Admin. News at 4736 (1976).

22. H.R. 11939, 94th Cong., 2nd Sess. (1976).

23. S. Rep. 94-882 *in* 4 U.S. Code Cong. & Admin. News 4737 (1976).

24. A memorandum from the Office of General Counsel, HEW, relied upon this factor in concluding that the accreditation-reliance system did not constitute an impermissible delegation of public power to a private group.

> Private agencies undertake to accredit schools for many reasons other than Federal aid eligibility. Accreditation is generally considered to be the single most reliable indicator of institutional quality in higher education, and private accrediting agencies play a broad role. . . . *The Federal-aid statutes merely take cognizance of this well-established system.*

Working Paper on Congress' Power to Rely upon Determination of Private Accrediting Agencies As Basis of Eligibility for Federal Educational Assistance, Office of General Counsel, HEW, June, 1970 (emphasis added).

25. *The Orlans Report* did not fully endorse this view. *Id.* at 133-134. It was, however, either critical of the wisdom or cynical about the effectiveness of these policies. *Id.* at 158-212.

26. Address of John R. Proffitt quoted in Finkin at 371.

27. 392 U.S. 157 (1968).

28. *Id.* at 172-173.

29. Jaffe, *The Illusion of the Ideal Administration*, 86 Harv. L. Rev. 1183, 1193 (1973).

30. It is helpful to compare *Southwestern Cable* with *American Trucking Ass'ns, Inc.* v. *United States*, 242 F. Supp. 597 (D.D.C. 1965) (three judge court), *aff'd*, 382 U.S. 373 (1966). The question was whether the Interstate Commerce Commission had jurisdiction to determine standards of safety for railway-highway crossings. In holding that the ICC lacked jurisdiction, despite the seemingly encompassing language of the Safety Appliance Act, the court noted the deletion of a provision that would have expressly included such devices and stressed that the subject matter had traditionally been regarded as a state matter; thus, the court required a clearer expression of Congressional intent to make an expansion of federal administrative authority into an area long regarded as a state prerogative. See also *Kent* v. *Dulles*, 357 U.S. 116 (1958). *Cf. National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974).

31. Heyns, *The Improvement of Self-Regulation in Higher Education*, address presented at COPA Conference on Accreditation, February 3, 1977.

32. Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307, 333 (1976). *See also* Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 Ind. L. Rev. 650, 681-683 (1975) (treating educational accreditation statutes).

33. The National Science Foundation Act of 1950, 64 Stat. 149 (1950), allowed the Foundation to award fellowships for scientific study at accredited institutions. The Office of Education has made note of "third party" use of the Commissioner's list. *Analysis of the U.S. Office of Education's Role in Recognizing Accrediting Agencies*, Memorandum Prepared by Accrediting Agency Evaluation Branch, DEAE, January 15, 1978. The Office of General Counsel, HEW, has pointed out that the Immigration and Nationality Act governing student visas, and the Housing Act, governing college housing, rely upon institutional accreditation. *Responsibility Delegated to the U.S. Commissioner of Education under Statutory Requirements Relating to Institutional Academic Eligibility*, Office of General Counsel, HEW, Sept. 1, 1974. That list is not exhaustive; cursory research has revealed several approaches. Some statutes, like the State Technical Services Act, 15 U.S.C. Sec. 1352(c) (1970) (which the General Counsel does note), or grants to graduate schools of social work under 42 U.S.C. Sec. 908(d)(2) (1970), delegate to the Commissioner of Education the authority to publish a list of accrediting agencies, employing the now customary "boilerplate." On the other hand, for the purposes of scholarship, grants and contracts to assist students in and educational programs of water quality treatment, the Secretary of Commerce is substituted for the Commissioner of Education in the familiar boilerplate. 33 U.S.C. Sec. 1262(a)(1) (Supp. V 1975) *See also* H. Rep. No. 91-127, 2 U.S. Code Cong. & Admin. News 2709 (1970). Similarly, the Secretary of the Interior is given authority to enter into contracts for nursing education of American Indians with schools of nursing "accredited by a body or bodies approved for such purpose by the Secretary [of the Interior]." 25 U.S.C. Sec. 309 (1970). Other statutes simply rely upon the fact of "accreditation." *See e.g.*, 33 U.S.C. Sec. 902(18)(B) (Supp. II 1972); 5 U.S.C. Sec. 810(17)(B) (1970); 10 U.S.C. Sec. 2102(a) (1970); 10 U.S.C. Sec. 2120(3) (Supp. II 1972); 10 U.S.C. Sec. 4314 (Supp. IV 1974); and 7 U.S.C. Sec. 2014(c) (1970).

34. Proffitt's *Connection.* See also, *Analysis of the U.S. Office of Education's Role in Recognizing Accrediting Agencies*, Accrediting Agency Evaluation Branch, Division of Eligibility and Agency Evaluation, January 15, 1978. ("From the Office of Education's perspective, application for listing. . . by the Commissioner is entirely voluntary. No agency has ever been recruited for listing by this Office.")

35. Under the Federal Administrative Procedure Act, 5 U.S.C. Sec. 706 (1970), a reviewing court is to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." While judicial review under the APA is exempted "to the extent that . . . agency action is committed to agency discretion by law," 5 U.S.C. Sec. 701(a)(2) (1970), it is clear from the analyses in this discussion that the extent of the Commissioner's discretion is narrowly circumscribed by law.

36. Proffitt's *Connection.*

37. *Cf. The Orlans Report* at 134 (emphasis added):

> Finkin cites the requirement that an accrediting agency "enforce ethical standards" as one which is irrelevant to a determination of educational quality, *as indeed it is*, but it is not irrelevant to the public acceptance of an agency as being a "reliable" authority since one can hardly be reliable without being honest.

The "ethical practices" criterion does not require that the accrediting agency be ethical—surely a necessary aspect of reliability—but that it undertake a new policing function vis-a-vis accredited institutions. The Commissioner could require such an undertaking only if the observance of ethical practices by institutions is a necessary aspect of educational quality, which, Orlans agrees, it is not.

38. Frankfurter, *Some Reflections on the Reading of Statutes*, 34 Colum. L. Rev. 527, 533 (1947).

39. The Council on Postsecondary Accreditation, *A Brief Analysis of the U.S. Office of Education's Role in Recognizing Accrediting Agencies*, December 2, 1977.

40. The rebuttal is contained in a DEAE memorandum of January 15, 1978 note 32, *supra.* Supporting legal argument is supplied in a paper prepared by the Office of the General Counsel, HEW, Conway, *The Commissioner's Authority to List Accrediting Agencies and Associations: Necessity for an Eligibility Issue*, May 25, 1978.

41. The Public Health Service Act, 42 U.S.C. Sec. 295(h), which authorizes grants for certain graduate programs in health administration and planning, is also such an act. The regulations recently adopted speak directly to the issue in terms that parallel Secretary Cohen's earlier understanding: "under these regulations, if another body were given initial or expanded recognition by the Commissioner to include these areas, institutions with programs accredited by such bodies would also become eligible for grants under this subpart." 43 Fed. Reg. 26443 (1978).

42. In a 1976 speech, the Director of the Office of Education's Division of Eligibility and Agency Evaluation quoted with approval the following statement of the Office of Education's role:

> the government is exploring a new kind of role for itself: this is not the role of the accreditor nor the regulator. . . . The role of government

would seem to be to franchise the regulator by setting standards and recognizing the private agency for its compliance with the standards. Proffitt's *Connection.*

43. *Compare* the DEAE position paper, note 32 *supra,* with *The Orlans Report* at 171-176.